No. 15,698

United States Court of Appeals

For the Ninth Circuit

ARMIDA ALDRIDGE,
Appellant,

vs.

STATES MARINE CORPORATION OF DELAWARE, a Corporation,
Appellee.

APPELLANT'S OPENING BRIEF.

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APPELLANT'S OPENING BRIEF.

This is an appeal from orders of the District Court for the Northern District of California (R. 33, 35) dismissing plaintiff's (appellant's) first amended complaint without leave to amend.

JURISDICTIONAL STATEMENT.

The jurisdiction of the District Court below is based upon the diversity of citizenship of the parties (28 USCA 1332). This Court has jurisdiction to review the judgment below by virtue of the provisions of §§1291 and 1294(1), 28 USCA.

OPINIONS BELOW.

Although there was no formal opinion of the Court below, District Judge Edward P. Murphy's Order (R. 33-34), dismissing the first amended complaint, sets forth the reason therefor as follows:

> "Assuming arguendo that the shipowners had a duty to the stevedores to furnish means with which to break the strapping, it affirmatively appears from the facts alleged in the complaint that the breach of this duty was not the proximate cause of decedent's death.
>
> "Accordingly, defendant's motion is granted and the complaint is dismissed."

STATEMENT OF THE CASE.

Appellant is the widow of a longshoreman who was killed on October 25, 1956, at Pier 44, San Francisco, California, while engaged in work as a longshoreman aboard the American vessel SS LONE STAR STATE, owned and operated by States Marine Corporation of Delaware, appellee herein.

Appellant brought suit for damages in the San Francisco Superior Court against States Marine Corporation, her complaint charging in two counts: (1) that her husband's death was caused by the unseaworthiness of the vessel, its gear and appurtenances; and (2) that his death was caused by the negligence of appellee, its agent and employees. The case was removed by appellee to the Federal District Court below, on the grounds of diversity of citizenship of

the parties. Appellant thereupon filed timely demand for jury trial.[1]

Appellee then moved to dismiss the complaint on two grounds: (1) that due to the absence of a maritime death statute, the doctrine of unseaworthiness, upon which the first cause of action in the complaint is based, cannot be invoked by appellant in this case; and (2) that the second count should be dismissed because lack of proximate cause appeared from the face of the complaint itself. Appellant thereupon filed an amended complaint eliminating the first count based on unseaworthiness, and containing one count based on negligence only.

The charging allegations of the first amended complaint are set forth in paragraphs IV, V and VI thereof (R. 18-21), and in substance are as follows:

IV.

That on October 25, 1956, at Pier 44, San Francisco, California, decedent Aldridge was working aboard the SS LONE STAR STATE as a longshoreman employed by Schirmer Stevedoring Co. That in performing said work he occupied the position of a seaman in that he was doing work which traditionally was performed by members of the crew. That by reason of this fact appellee owed the decedent a duty to furnish adequate tools for the performance of his work and a reasonably safe place in which to work.

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[1]See entry No. 4, "Excerpt from Docket Entries", certified Transcript of Record before this Court.

V.

That decedent reported for duty aboard the SS LONE STAR STATE at 7 a.m. on the morning of October 25, 1956, and proceeded with other longshoremen to work in the number three hold of the vessel. That during the course of the work it was necessary for the longshoremen to use dunnage in the stowage of cargo. That for that purpose bundles of dunnage, each bundle weighing between one and two tons, and consisting of large pieces of lumber of various sizes and weights strapped together by metal bands, were lowered into the hold of the vessel. That when the first load of dunnage came into the hold, the longshoremen requested of appellee's Port Captain and other of appellee's employees that they be supplied with band cutters or other mechanical means for breaking the steel bands around the dunnage. That the longshoremen were advised that no band cutters or other mechanical means were available for this purpose on the ship but sent a ship's carpenter into the hold equipped with hammers for the purpose of breaking the bands. That such was the means provided by the vessel to free the dunnage during the early portion of the work. That later on in the day, when it was necessary to break the steel bands surrounding an additional bale of dunnage coming into the hold, the supervisory personnel of appellee, although requested to do so, negligently and carelessly failed to provide or supply either the ship's carpenter or band cutters or other mechanical means by which the bands could be cut or broken. That by reason of

such carelessness and negligence, the only means and method remaining to the longshoremen for breaking the dunnage free of the steel bands was to employ the hook secured to the winch fall. That this was accomplished by inserting the same into the steel bands and then raising the load of dunnage and breaking the steel bands by means of the weight of the dunnage itself. That in performing the operation in this manner, several heavy timbers fell upon decedent, inflicting fatal injuries upon him.

VI.

The death of said William J. Aldridge was directly and proximately caused by the aforesaid carelessness and negligence of defendants.

Appellee then moved to dismiss the first amended complaint upon the ground that, *as a matter of law,* it appeared from the allegations thereof that the alleged negligence of the appellee was not a proximate cause of the longshoremen's death. District Judge Edward P. Murphy sustained the motion on this ground (R 33).

Appellant then moved to vacate and set this order aside, or in the alternative for permission to file an amended complaint (R 34-35). The motion was denied, and this appeal follows.

SPECIFICATION OF ERRORS.

1. Appellant's first amended complaint sets forth a cause of action against appellee and the order of the Honorable District Judge below dismissing the same is contrary to law and unconstitutionally deprives appellant of her right to a jury trial on the issue of negligence and proximate causation.

2. The subsequent order of the Honorable District Judge below (R. 35), denying appellant an opportunity to amend her first amended complaint to remedy the defects felt by the District Judge to reside in her first amended complaint, was also erroneous.

ARGUMENT.

I.

GENERAL PRINCIPLES OF LAW APPLICABLE TO THE CASE AT BAR.

A. On a motion to dismiss, the pleadings must be viewed in a light most favorable to plaintiff. *Machado v. McGrath,* 193 F. 2d 706 (C.A.D.C.); *Louisiana Farmers Protective Union v. Great A & P Tea Co.,* 131 F. 2d 419 (8 Cir.).

> "This court frequently has commented upon the considerations which should govern in ruling upon a motion to dismiss a complaint for insufficiency of statement. It is unnecessary to repeat here what the court has said on many occasions, particularly in the case of Leimer v. State Mutual Life Assurance Co., 8 Cir., 108 F. 2d 302, in which reference is made to many of the pertinent decisions of this court. It is enough to

observe, as was done in the Leimer case, that no matter how improbable it may be that the plaintiff can establish the allegations of its complaint, it is, nevertheless, entitled to the opportunity to make the attempt. The opinion of the district judge, in advance of a hearing, as to the impossibility of proof of a cause of action fairly stated, is not decisive of the rights of the parties. And see Sparks v. England, 8 Cir., 113 F. 2d 579, 581."

Louisiana Farmers Protective Union v. Great A & P Tea Co., supra, at 423-424.

B. Plaintiff's right to a jury trial in negligence cases is being guarded by the Supreme Court with ever increasing zealousness.

Tennant v. Peoria & Pekin R. Co., (1943), 321 U.S. 29. This was an action for wrongful death under the Federal Employers Liability Act. The Court of Appeals for the Seventh Circuit reversed a jury verdict in the court below for $26,250.00. The Supreme Court reversed the Court of Appeals, having this to say at page 35:

"It is the jury, not the court, which is the fact-finding body. It weighs the contradictory evidence and inferences, judges the credibility of witnesses, receives expert instructions, and draws the ultimate conclusion as to the facts. The very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable. * * * "

Schulz v. Pennsylvania R. Co. (1955), 350 U.S. 523. This was an action for wrongful death brought under the Jones Act. The District Court directed a verdict

for the defendant, and the Court of Appeals for the Second Circuit affirmed. The Supreme Court reversed, holding that the case should have gone to the jury. The Court stated at page 525:

> "In considering the scope of the issues entrusted to juries in cases like this, it must be borne in mind that negligence cannot be established by direct, precise evidence such as can be used to show that a piece of ground is or is not an acre. Surveyors can measure an acre. But measuring negligence is different. The definitions of negligence are not definitions at all, strictly speaking. Usually one discussing the subject will say that negligence consists of doing that which a person of reasonable prudence would not have done, or of failing to do that which a person of reasonable prudence would have done under like circumstances. Issues of negligence, therefore, call for the exercise of common sense and sound judgment under the circumstances of particular cases. '[W]e think these are questions for the jury to determine. We see no reason, so long as the jury system is the law of the land, and the jury is made the tribunal to decide disputed questions of fact, why it should not decide such questions as these as well as others.' Jones v. East Tennessee, V. & G. R. Co., 128 US 443, 445, 32 L ed 478, 480, 9 S Ct 118 (1888)."

Ferguson v. Moore-McCormack Lines, Inc., (1957) 1 L. ed. 2d 511. This was also a suit for damages under the Jones Act. The Court of Appeals for the Second Circuit reversed a jury verdict in favor of plaintiff, holding that it was "not within the realm of reasonable foreseeability" that petitioner would

use a knife to chip frozen ice cream. The Supreme Court reversed, stating at pages 513-514:

> "Respondent urges that it was not reasonably foreseeable that petitioner would utilize the knife to loosen the ice cream. But the jury, which plays a preeminent role in these Jones Act cases (Jacob v. New York, 315 US 752, 86 L ed 1166, 62 S Ct 854; Schulz v. Pennsylvania R. Co., 350 US 523, 100 L ed 668, 76 S Ct 608), could conclude that petitioner had been furnished no safe tool to perform the task. It was not necessary that respondent be in a position to foresee the exact chain of circumstances which actually led to the accident. The jury was instructed that it might consider whether respondent could have anticipated that a knife would be used to get out the ice cream. On this record, fair minded men could conclude that respondent should have foreseen that petitioner might be tempted to use a knife to perform his task with dispatch, since no adequate implement was furnished him. * * *
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> * * * * * * *
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> "Because the jury could have so concluded, the Court of Appeals erred in holding that respondent's motion for a directed verdict should have been granted. 'Courts should not assume that in determining these questions of negligence juries will fall short of a fair performance of their constitutional function.' Wilkerson v. McCarthy, 336 US 53, 62, 93 L ed 497, 505, 69 S Ct 413."

Rogers v. Missouri Pacific R. Co. (1957), 1 L.ed. 2d 493, 515. This was an action for damages under the Federal Employers Liability Act. The trial Court directed a verdict in favor of the plaintiff. The Su-

preme Court of Missouri reversed on the ground that the employee's evidence did not support the finding of the employer's liability. On certiorari, the Supreme Court reversed the decision of the Court below, having this to say at pages 499-501:

> "Judicial appraisal of the proofs to determine whether a jury question is presented is narrowly limited to the single inquiry whether, with reason, the conclusion may be drawn that negligence of the employer played *any part at all* in the injury or death. Judges are to fix their sights primarily to make that appraisal and, if that test is met, are bound to find that a case for the jury is made out whether or not the evidence allows the jury a choice of other probabilities. * * * (Emphasis added.)
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> * * * * * * *
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> "Cognizant of the duty to effectuate the intention of the Congress to secure the right to a jury determination, this Court is vigilant to exercise its power of review in any case where it appears the litigants have been improperly deprived of that determination. * * * "

Webb v. Illinois Central R. Co. (1957), 1 L.ed. 2d 503. This was an action against a railroad for damages for personal injuries. The trial judge refused to direct a verdict for the defendant railroad. The Court of Appeals for the Seventh Circuit reversed. The Supreme Court reversed the latter Court, stating at pages 506-507:

> "Although we do not think that the case presents an issue of causation, if the quoted language of the Court of Appeals is read as holding that a

jury finding could not reasonably be made that respondent's negligence 'in whole or in part' caused the petitioner's injury, then what we said in Rogers v Missouri Pacific R. Co. .....US ....., ..., 1 L ed 2d 493, 515, 77 S Ct ....., also decided today, is pertinent:

" ' . . . But that would mean that there is no jury question in actions under this statute, although the employee's proofs support with reason a verdict in his favor, unless the judge can say that the jury may exclude the idea that his injury was due to causes with which the defendant was not connected, or, stated another way, unless his proofs are so strong that the jury, on grounds of probability, may exclude a conclusion favorable to the defendant. That is not the governing principle defining the proof which requires a submission to the jury in these cases . . . '

" 'Under this statute the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought. It does not matter that, from the evidence, the jury may also with reason, on grounds of probability, attribute the result to other causes, including the employee's contributory negligence. Judicial appraisal of the proofs to determine whether a jury question is presented, is narrowly limited to the single inquiry whether, with reason, the conclusion may be drawn that negligence of the employer played any part at all in the injury or death. Judges are to fix their sights primarily to make that appraisal and, if that test is met, are bound to find that a case for the jury is made

out whether or not the evidence allows the jury a choice of other probabilities.' "

C. In the absence of state cases to the contrary,[2] the federal Courts will apply the principles and definitions of proximate causation set forth in the *Restatement of Torts* in passing upon the question of whether or not the issue of causation in a particular case is a jury question. *United States v. Marshall,* 230 F. 2d 183 (9 Cir.).

D. The pertinent principles and definitions of the *Restatement of Torts* (*United States v. Marshall, supra,* pp. 190, 191) are as follows:

"Section 441 of the *Restatement of Torts* defines an Intervening Force. '(1) An intervening force is one which actively operates in producing harm to another after the actor's negligent act or omission has been committed.

" '(2) Whether the active operation of an intervening force prevents the actor's antecedent negligence from being a legal cause in bringing about harm to another is determined by the rules stated in Section 442 to 453.' We later consider such of these sections as are applicable.

"The comment on Subsection (2) of Section 441, states p. 1187:

" 'd. The active operation of an intervening force may or may not be a superseding cause which relieves the actor from liability for another's harm occurring thereafter;' and ' * * * both the actor and the third person are concurrently liable * * * although the actor's con-

[2]We have found no California cases to the contrary.

duct has ceased to operate actively and has merely created a condition which is made harmful by the operation of the intervening force set in motion by the third person's negligent or otherwise wrongful conduct. However, while there is concurrent liability, the two forces are not concurrent causes as that term is customarily used. To be a concurrent cause, the effects of the negligent conduct of both the actor and the third person must be in active and substantially simultaneous operation. (See Sec. 439).'

* * * * * * *

"Section 447 of the Restatement of Torts reads:

" 'Negligence of Intervening Acts.

" 'The fact that an intervening act of a third person is negligent in itself or is done in a negligent manner does not make it a superseding cause of harm to another which the actor's negligent conduct is a substantial factor in bringing about, if

" '(a) the actor at the time of his negligent conduct should have realized that a third person might so act, or

" '(b) a reasonable man knowing the situation existing when the act of a third person was done would not regard it as highly extraordinary that the third person had so acted.

" '(c) the intervening act is a normal response to a situation created by the actor's conduct and the manner in which it is done is not extraordinarily negligent.' "

E. The question of proximate causation in a negligence action is ordinarily a question of fact and not

of law. *United States v. Marshall, supra,* at 192. This is also the rule in California. *Gerberich v. Southern California Edison Co., Ltd.,* 5 Cal. 2d 46; *Copfer v. Golden,* 135 C.A. 2d 623; *O'Hey v. Matson Navigation Co.,* 135 C.A. 2d 819; *Darnold v. Voges,* 143 C.A. 2d 230.

II.

APPLICATION OF THE FOREGOING GENERAL RULES TO THE CASE AT BAR.

The first amended complaint in this action alleges: (1) that the appellee negligently failed to furnish certain tools to assist the decedent and his fellow longshoremen in performing their work in a safe manner; and (2) that such negligence was the proximate cause of the accident which ensued.

While from the face of the complaint it appears that there was a subsequent intervening act which "triggered" the accident, the question of whether such an act was a *superseding* or *concurrent cause* (See provisions of *Restatement of Torts, supra*) is for the trier of the facts to decide. It is not for the Court to decide on a motion to dismiss. This is so even though the intervening cause was itself a negligent act (See Section 447, *Restatement of Torts,* quoted in full *supra*).

To hold otherwise would unconstitutionally deprive appellant of her right to a jury trial on this crucial issue.

III.

ASSUMING ARGUENDO THAT THE FIRST AMENDED COMPLAINT ON ITS FACE SHOWS A LACK OF PROXIMATE CAUSE, IT WAS ERROR FOR THE COURT BELOW TO REFUSE APPELLANT THE OPPORTUNITY TO AMEND, ALLEGING FACTS SHOWING SUCH PROXIMATE CAUSE.

In the argument on appellant's motion to vacate and set aside the order of the Court below dismissing her first amended complaint, her counsel stated (R. 44, 46) that the appellant would introduce evidence at the time of trial (1) that ordinarily the shipowner furnishes proper tools for the particular operation here involved; (2) that when such tools are not made available to the longshoremen, the only method left to them to accomplish their objective is to do what was done in this case; and (3) that the shipowner knew, or by the exercise of reasonable care should have known, that this was the fact.

There could be no question but that a complaint containing such allegations would state a cause of action against appellee, although it would, of course, be incumbent upon appellant to produce competent evidence at the time of trial to support the allegations.

CONCLUSION.

It is respectfully submitted that the Court below erred in granting appellee's motion to dismiss appellant's first amended complaint without leave to amend.

Dated, San Francisco, California,
January 6, 1958.

Respectfully submitted,

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